Supreme Court, U.S.
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No. 03-985

In The
Supreme Court of the United States

Lonnell Brewer,

Petitioner,

v.

Board of Trustees of University of Illinois, and Kerrin Thompson, L. Denise Hendricks, Wallace Hendricks, and Peter Feuille in their Official and Individual Capacities,

Respondents

On Petition for Writ of Certiorari
To The Illinois Court of Appeals for The
Fourth Judicial District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether interpreting the Illinois Human Rights Act Such That it Preempts the Illinois Circuit Court of Original Jurisdiction of All Federal Civil Rights Claims, Whether or Not Such Claims Are In The Purview of The Act, Violates The Supremacy Clause of the United States Constitution

2. Whether the Eleventh Amendment Bars Americans With Disabilities Act Claims Against State Entities When Both State and Federal Courts Have Held That The State Has Consented To Suit.

PARTIES TO THE PROCEEDING

There are no parties to this proceeding that do not appear in the case caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Lonnell Brewer, respectfully prays that a writ of certiorari issue to review the judgment and opinion of Illinois Court of Appeals for the Fourth Judicial District entered in this proceeding on June 17, 2003, in order to bring the opinion of the Court of Appeals into conformance with federal law interpreting the Supremacy Clause and the Eleventh Amendment.

OPINIONS BELOW

The opinion of the Illinois Court of Appeals for the Fourth District can be found at *Brewer v. University of Illinois,* 339 Ill.App.3d 1074, 791 N.E.2d 657, 274 Ill.Dec. 565 (4th Dist. 2003) (App. C). The denial of petition for appeal by the Illinois Supreme Court is not published (App. F). The Amended Judgment of the Circuit Court of Champaign County, Illinois is also not published. (App. B).

STATEMENT OF JURISDICTION

The Appellate Court of Illinois, Fourth District entered its judgment on June 17, 2003. No petition for rehearing was filed. The Supreme Court of Illinois Denied the Petition for Appeal as a Matter of Right or Leave to Appeal on October 7, 2003.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257 because petitioner raised and preserved, and a state court of last resort rejected federal constitutional claims.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

SUPREMACY CLAUSE

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S.C.A. Const. Art. VI, cl. 2.

ELEVENTH AMENDMENT

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S.C.A. Const. Amend. XI.

ILLINOIS HUMAN RIGHTS ACT

§ 8-111. Court Proceedings.

(C) Limitation. Except as otherwise provided by law, no court of this state shall have jurisdiction over the subject of an alleged civil rights violation other than as set forth in this Act.

775 ILCS 5/8-111(C).

(the Act in its entirety is set forth in App. D)

STATEMENT OF THE CASE

A. Factual Background

Petitioner was enrolled in the Master's Degree Program at the University of Illinois, Champaign Urbana, as well as employed as a Research Assistant in the University's Personnel Services Office in 1997 and 1998. On April 22, 1998, Petitioner was terminated from his employment with the University. On June 18, 2998, Petitioner was terminated from the Master's Degree program. Petitioner filed a timely Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC) alleging that his termination from his employment and from the master's degree program was due to his race and learning disability. The EEOC made a probable cause determination on Petitioner's disability discrimination claim, but the Department of Justice declined to pursue the claim on Petitioner's behalf.

B. The Proceedings Below

Petitioner filed his Complaint in the Circuit Court of Champaign County, Illinois. Petitioner's Complaint against defendants consisted of five (5) counts. Count I asserted a race discrimination claim under Title VII against all defendants. Count II alleged an Americans with Disabilities Act ("ADA") failure to accommodate claim against The Board of Trustees and defendants Thompson and Hendricks. Count III alleged §1983 claims against the individual defendants in their individual capacities for equal protection violations and violations of Title VI and the ADA. Count IV asserted a Title VI claim against all defendants for race discrimination. Count V alleges

retaliation by all defendants for Petitioner's complaints concerning the alleged acts of discrimination.

In lieu of an Answer to the Complaint, Defendants filed a Motion to Dismiss for want of subject matter jurisdiction. In their Motion, Defendants argued that the Eleventh Amendment bars Petitioner's ADA claim, that "there is no individual liability under Title VII, Title VI or the ADA", and that the Illinois Human Rights Act ("the Act") preempts the circuit court of original jurisdiction for all of Petitioner's claims. In his Response, Petitioner argued that the Eleventh Amendment does not bar ADA claims brought in state court, that there is individual liability for state actors for constitutional and statutory violations under 42 U.S.C. §1983, and that the Act cannot preempt the circuit court of original jurisdiction of any of Petitioner's claims, in part because such "preemption" contradicts clear federal authority and violates the Supremacy Clause, U.S. Const. Art. VI, § 2. (App.E) Accordingly, the constitutional issues addressed herein were raised at the earliest possible stage of the state court proceedings.

The trial court set defendants' Motion to Dismiss for hearing on September 23, 2002. The trial court issued an order immediately following oral argument granting defendants' Motion and dismissing all of Petitioner's claims. The trial court dismissed Count II (the ADA claim) on the basis that the Illinois Supreme Court's decision in *Cooper v. Illinois State University*, 331 Ill.App.3d 1094, 772 N.E.2d 396 (2002), compelled the court to dismiss. (App. A) Counts III, and V (and presumably, Count I) were dismissed on the basis that *Faulkner-King v. Wicks*, 226 Ill.App.3d 962, 590 N.E.2d 511 (4th Dist. 1992) dictated that conclusion that the Illinois Human Rights Act pre-

empts all civil rights claims, including those based on federal law. (App. A) The trial court expressly noted that both *Cooper* and *Faulkner-King* appeared to conflict with federal court decisions. (App. A) Count IV was dismissed because the trial court concluded that the Court of Claims was the exclusive venue within which the Title VI claim could be brought. (App. A)

The trial court initially dismissed Petitioner's claims "with prejudice." At the close of the trial court's oral ruling on Defendants' Motion, Petitioner raised the issue of the propriety of dismissal for want of jurisdiction "with prejudice." The Court invited the Petitioner to file a Motion for Modification of Judgment to address this issue, which Petitioner did. Defendants' did not object to this Motion, and the Court entered an Amended Judgment on October 21, 2002. (App. B)

Petitioner timely filed his Notice of Appeal to the Illinois Court of Appeals for the Fourth District on October 23, 2002. The Appellate Court of Illinois, Fourth District entered its judgment on June 17, 2003 affirming the trial court's dismissal of all of petitioner's claims. (App. C) No petition for rehearing was filed. The Supreme Court of Illinois Denied the Petition for Appeal as a Matter of Right or Leave to Appeal on October 7, 2003. (App. F)

REASONS FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW HAS DECIDED AN IMPORTANT SUPREMACY CLAUSE ISSUE IN A MANNER THAT CONFLICTS WITH *HOWLETT V. ROSE* AND CORRESPONDING AUTHORITIES.

There is a direct conflict between state and federal authorities on the issue of whether a state may bar certain federal civil rights claims from its courts. The state appellate court's decision directly contradicts controlling U.S. Supreme Court authority which dictates the conclusion that "***Illinois may not exclude claims based on federal law.***" *Erickson v. Board of Governors of State Colleges & Universities for Northeastern Illinois University,* 207 F.3d 945, 952 (7th Cir. 2000), citing *Howlett v. Rose*, 496 U.S. 356, 367-75, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990); *FERC v. Mississippi*, 456 U.S. 742, 759-69, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982); *Testa v. Katt*, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967(1947). This conflict underscores the general importance of the issue.

Moreover, the Appellate Court's decision significantly impacts the civil rights of state employees, particularly those who are the victims of age or disability discrimination. Assuming, *arguendo*, that the Court determines that Illinois has not consented to suit and that the state is entitled to sovereign immunity on ADA claims (and presumably ADEA claims), victims of age and disability discrimination have no recourse except to file a claim with the Illinois Human Rights Commission. With all due deference to the Commission, the loss of the opportunity for discovery and right to a jury trial are significant to such victims of discrimination. Because this issue has far-reaching implications with respect to the civil rights of state employees, this Court should review this case and resolve the conflict between state and federal law

The trial court, acknowledging the conflict between state and federal law, concluded that Counts I, II, III and V were preempted by § 8-111(C) of the Illinois Human Rights Act ("the Act") under *Faulkner-King v. Wicks*, 226 Ill.App.3d 962, 590 N.E.2d 511 (1992). Section 8-111(C) states that "[e]xcept as otherwise provided by law, no court

of this state shall have jurisdiction over the subject of an alleged civil rights violation other than as set forth in [the] Act." 775 ILCS 5/8-111(C).

Reversal of the appellate court's decision is proper because the court's interpretation of the Act violates the Supremacy Clause, U.S. Const. Art. VI, § 2. In *Donnelly v. Yellow Freight System, Inc.* 874 F.2d 402, 409-10 (7th Cir. 1989), Aff'd, 110 S.Ct. 1566 (1990), the Seventh Circuit, interpreting well-established U.S. Supreme Court precedent explicitly concluded that Illinois courts must recognize federal employment discrimination claims. Id. at 409. In *Donnelly*, defendant argued that, pursuant to *Mein v. Masonite Corp.*, 109 Ill.2d 1, 485 N.E.2d 312 (1985), that Illinois Title VII claims could not be heard in state court. *Id.* The Seventh Circuit explicitly rejected this argument stating:

> Even if the *Mein* court did, in fact, intend to exclude Title VII claims from the Illinois courts, **neither the Illinois courts nor legislature have the power to close state court doors to federal causes of action**. When presented with a federal claim over which concurrent jurisdiction exists, state courts are under a "duty to exercise (jurisdiction)" over the federal claim.
>
> . . . .
>
> Once Congress has vested jurisdiction over a federal claim in the state courts, the state courts, including the courts of Illinois, are under a constitutional obligation to exercise jurisdiction.

Id. (citations omitted). To "close state doors" to federal causes of action as the above-referenced state authorities purport to do violates the Supremacy Clause, U.S. Const.

Art. VI, § 2. *Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430 (1990). In *Howlett*, this Court held that Florida's refusal to entertain a 42 U.S.C.§1983 claim against a school district, when state courts entertained similar state-law actions against state defendants, violated the Supremacy Clause. *Howlett* is controlling and directly applicable to the instant case. It is undisputed that Illinois does entertain civil rights actions against state defendants through the Act. Thus, under *Howlett*, the refusal to provide a state forum for similar federal claims is an unequivocal violation of the Supremacy Clause.

The propriety – indeed the necessity --of bringing an employment discrimination action under the ADA in Illinois state court was recently addressed by the Seventh Circuit in *Erickson*, 207 F.3d at 952 (7th Cir. 2000), which, in part, interpreted and relied upon *Howlett*. In concluding that the petitioner could not bring an ADA claim against the state *in federal court*, the court cautioned:

> But Northeastern Illinois University must understand the limits of this holding. The ADA is valid legislation, which both private and public actors must follow. Even if the Supreme Court should overrule *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), and return to the view of *National League of Cities v. Usery*, 426 U.S. 833, 852, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), that laws resting only on the Commerce Clause cannot "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions," ***the University still would be bound by the ADA***, for running a

> university is no more a core governmental function than is running a railroad. See *United Transportation Union v. Long Island R.R.*, 455 U.S. 678, 102 S.Ct. 1349, 71 L.Ed.2d 547 (1982). Like most railroads, most universities in the United States are private.
>
> All our holding means is that private litigation to enforce the ADA may not proceed in federal court. ***Erickson may repair to Illinois court***--for although states may implement a blanket rule of sovereign immunity, see *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999), Illinois has not done this. Having opened its courts to claims based on state law, including its own prohibition of disability discrimination by units of state government, see 775 ILCS 5/1-102, 5/2-101(B)(1)(c), ***Illinois may not exclude claims based on federal law.*** *Howlett v. Rose*, 496 U.S. 356, 367-75, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990); *FERC v. Mississippi*, 456 U.S. 742, 759-69, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982); *Testa v. Katt*, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967(1947). Moreover, the United States may enforce the ADA against the University and other state actors through federal litigation. [Citation.] But Erickson has not enlisted the United States as her champion * * * ***so this suit belongs in state court.***"

Id. at 952. (Emphasis added).

Although *Erickson* may not be controlling, the U.S. Supreme Court authorities referenced therein are controlling and compel the conclusion that "Illinois may not exclude claims based on federal law." *Erickson* at 952; *Howlett v. Rose*, 496 U.S. 356, 367-75, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990); *FERC v. Mississippi*, 456 U.S. 742, 759-69, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982); *Testa v. Katt*, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967(1947).

In fact, in *Cooper* the Fourth District explicitly acknowledged that it is bound to follow U.S. Supreme Court law as to issues concerning the United States Constitution. *Cooper*, 331 Ill.App.3d at 1100, 772 N.E.2d at 400-401 (2002) The Supremacy Clause analysis is an issue of federal law and, as such, Illinois courts cannot ignore federal, and in particular, relevant authority of this Court.

For the reasons set forth herein, the Act cannot preempt the Illinois Circuit Court of jurisdiction for any of petitioner's claims. To the extent that the Act requires such a result, it is unconstitutional.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW HAS DECIDED AN IMPORTANT ELEVENTH AMENDMENT ISSUE CONCERNING WHEN A STATE CONSENTS TO SUIT, WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Appellate Court improperly upheld the trial court's dismissal of Petitioner's ADA claim (Count II), on the basis that *Cooper v. Illinois State University*, 331 Ill.App.3d 1094, 772 N.E.2d 396 (2002), applied to compel dismissal on Eleventh Amendment sovereign immunity grounds. In fact, *Cooper* read in conjunction with controlling federal authorities dictates the opposite result.

The doctrine of sovereign immunity is subject to numerous exceptions. *See Alden v. Maine*, 527 U.S. 706, 755-57, 119 S.Ct. 2240 (1999). 'The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law." *Id.* at 754-55. Immunity on federal claims is a question of federal, rather than state, law. *Payne for Hicks v. Churchich*, 161 F.3d 1030, 1038 (7th Cir. 1998). As this Court stated in *Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430 (1990), "[t]he elements of, and the defenses to, a federal cause of action are defined by federal law." *Id.* at 375. This Court explicitly stated that "[m]unicipal defenses—including an assertion of sovereign immunity—to a federal right of action are, of course, controlled by federal law. *Id.* at 376.

In *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. 356, 374, 121 S.Ct. 955 (2001), this Court held that Eleventh Amendment immunity bars ADA suits by private individuals against *non-consenting* states *brought in federal court. Id.* at 364. The Court in *Alden v. Maine*, 527 U.S. 706, 759-60, 119 S.Ct. 2240 (1999), clarified the applicability of sovereign immunity, holding that Congress cannot subject a state to suit in state court *without its consent. Id.* Citing *Alden,* the Seventh Circuit recently held:

> . . . although states may implement a blanket rule of sovereign immunity, Illinois has not done this. *Having opened its courts to claims based on state law, including its own prohibition of disability discrimination by units of state government, see 775 ILCS 5/1-102, 5/2-101(B)(1)(c)*, Illinois may not exclude claims based on federal law.

Erickson v. Board of Governors of State Colleges & Universities for Northeastern Illinois University, 207 F.3d 945, 952 (7th Cir. 2000) (emphasis added). Accordingly, the Seventh Circuit has definitively determined that Illinois has consented to suit and *may not exclude federal claims on the basis of sovereign immunity. Id.* This is the correct interpretation of this court's precedent. In *Cooper,* the Appellate Court explicitly conceded that the Seventh Circuit was correct in concluding that Illinois has consented to defend itself against employment discrimination claims. *Cooper,* 331 Ill.App.3d at 1100, 772 N.E.2d at 400-401 (2002).

Because *Cooper* and applicable federal authorities acknowledge Illinois' consent to suit for disability discrimination claims, under *Alden*, Petitioner's ADA claim should not be barred by the Eleventh Amendment.

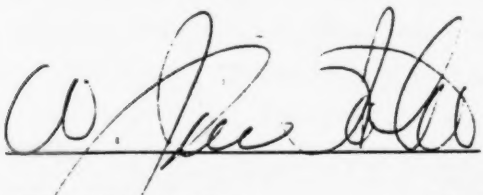
The Appellate Court's decision has grave repercussions for state employees in Illinois. Under the current state of the law, state employees who are the victims of disability or age discrimination have no recourse in *any* court, federal or state. Rather, they are limited to pursuing their actions before a state administrative agency – the Illinois Human Rights Commission. With all due deference to the Commission, one arm of the state policing another, particularly in the area of civil rights, raises, at least in theory, issues of bias and fundamental fairness. Moreover, the issue has great significance for all state employees – if Illinois can effectively insulate itself from liability for all age and disability discrimination claims, then other states can enact similar legislation that permits those states to circumvent these laws as well.

Because of the general importance and far-reaching implications of the immunity issue presented by this case, the Court should review this case to resolve the issue.

CONCLUSION

For each of the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,



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